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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

STEPHEN MICHAEL COHEN,

Petitioner,

v.

GARY KREMEN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was it proper for the District Court to declare Petitioner disentitled under the Fugitive Disentitlement Doctrine after that court was served with Apostille Documents demonstrating that Petitioner was in custody of a foreign government due to Petitioner returning funds as ordered by the District Courts.

2. Whether the District Court violated Petitioner's Due Process right under the Fifth Amendment to the United States Constitution by failing to hold a hearing once being served with Apostille Documents pursuant to the Hague Convention.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Stephen Michael Cohen, respectfully prays that a Writ of Certiorari issue to review the per curiam opinion of the United States Court of Appeals for the Ninth Circuit filed on March 24, 2005 which upheld the judgment of the United States District Court for the Northern District of California by dismissing his appeal pursuant to the Fugitive Disentitlement Doctrine.

OPINIONS BELOW

The opinion for which review is sought is *Gary Kremen v. Stephen Michael Cohen*, Ninth Circuit Case No. 04-17214 (March 24, 2005) (Appendix A), which refused to review the judgment of the trial court. Rehearing with suggestion en banc was denied April 29, 2005. (Appendix B). The District Court case No. C98-20718JW dated April 3, 2001 (Appendix C).

JURISIDICTION

Petitioner invokes the jurisdiction of this court under 28 U.S.C. §1254(1).

On April 29, 2005, the United States Court of Appeals entered its decision upon denial of a petition for rehearing.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution states in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

Judge Ware of the Northern District of California issued a "Summary Adjudication" and "Preliminary Injunction" on November 27, 2000, that was based upon *Disputed Facts*. Contained within the Preliminary Injunction was a direct order ordering Petitioner to return funds to the United States for deposit with the District Court.

Petitioner immediately went to two companies located in Tijuana, Mexico and successfully retrieved two cashier's checks and turned these cashier's checks over to the custody of the court through Petitioner's counsel.

Petitioner's actions violated Mexican law. Consequently, Petitioner was arrested and detained by the Mexican authorities.

On March 2, 2002, Judge Ware held Petitioner in civil contempt for non-appearance which resulted in Petitioner being declared a FUGITIVE. The order states, "It is hereby ordered that as a sanction for their contempt and the only practicable manner of remedying the harm to plaintiff at this time, the eve of trial, Defendants shall be *precluded at trial from offering any evidence, either in their case in chief, by way of impeachment, or in rebuttal.*"

Repeatedly, Petitioner's attorney provided the court with substantial proof that since January 28, 2001 Petitioner was detained in Mexico.

Petitioner's counsel presented Apostille documents from the Mexican Judicial System verifying Petitioner's detention in Mexico pursuant to The Hague and Inter-American Convention on three occasions.

The Court refused to hold a hearing, accept the Apostille documents or issue a finding of facts relating to them. The District Judge merely stated, "The court is unmoved by Cohen's implausible and unsupported position that he is under house arrest in Mexico."

Petitioner at the time of each and every order issued after January 15, 2001, and throughout the period of his appeal was under the custody of the Mexican Judicial System for doing *exactly* what Judge Ware ordered Petitioner to do.

Petitioner's prior attorneys filed a notice of appeal based solely on the issue of Respondent's "lack of standing." The Ninth Circuit in case number was 01-15886 concluded that Petitioner was bared from his appeal by the Fugitive disentitlement doctrine and affirmed the District Court. Petitioner's prior attorneys also filed a Writ of Certiorari before this Court under docket number 02-1462 and certiorari was denied on June 9, 2003.

On October 26, 2004, Judge Ware issued a *new order* which is the subject of this new appeal. The new order conflicted with the District Judge's prior order granting preliminary injunction and summary adjudication on November 28, 2000 and the final judgment entered on April 3, 2001. The current order is both factually and

legally inconsistent with the district court's prior orders and findings of facts. Judge Ware's new order resurrects the issues of Fugitive Disentitlement and standing.

The District Judge had ruled on November 27, 2000, that the law of the case was that "sex.com" could not be trademarked since the name was generic and therefore Petitioner has no rights to the name "sex.com." Petitioner's defense was that the trademark rights to "sex.com" belonged to Petitioner.

On October 26, 2004, the court ruled that the trademark rights filed with the United States Trademark and Patent office by Petitioner now be assigned to Respondent.

Petitioner immediately filed a timely appeal and was assigned case number 04-17214 by the Ninth Circuit Court of Appeals.

On March 24, 2005, the prior panel struck Petitioner's current appeal because Petitioner had already been declared disentitled under the Fugitive Disentitlement Doctrine.

On April 29, 2005, Petitioner's request for rehearing en banc was denied by the same three-judge panel for the Ninth Circuit Court of Appeals.

ARGUMENT

This case represents one of the most important cases to come before the United States Supreme Court because it deals with the ultimate expansion of the fugitive disentitlement doctrine beyond what its intended purpose and in clear violation of Petitioner's constitutional right to Due

Process under the Fifth Amendment to the United States Constitution.

When the District Judge declared Petitioner a fugitive without a hearing, ignored submitted Apostille documents demonstrating Petitioner's custody in Mexico, and failed to render any finding based upon the facts this was a clear violation of Petitioner's constitutional right to Due Process.

What originated as a remedy authorizing the dismissal of the appeal of an absconding criminal or civil defendant is now being used to circumvent the constitutional rights of individuals who NEVER absconded and thus deny them their constitutional right to due process.

In the instant case, the District Judge declared Petitioner a fugitive with full knowledge that Petitioner was in the custody of the Mexican authorities. What is most important is the Petitioner's custody status was not as a result of Petitioner's wrongdoing.

At no time did the District Judge ever hold a hearing relating to Petitioner's custody status in Mexico and there was no evidence that Petitioner ever fled the jurisdiction.

The District Judge was in possession at the time of numerous sets of Apostille documents issued from the Mexican Judicial System and authenticated pursuant to the Hague Convention. The United States and Mexico are both signers of The Hague Convention and most importantly, the United States Congress ratified this specific treaty as it relates to Apostille Documents.

The "Fugitive Disentitlement Doctrine," states in part . . . One who flees the jurisdiction of the United States and then seeks the help of the courts has forfeited his right to

appellate review. *Otrega-Rodrigues v. United States*, 507 U.S. 234, 242-44 (1993); *Estelle v. Dorrough*, 420 U.S. 534 (1975). Fugitive Disentitlement is invalid and cannot be applied where no fugitive status ever existed.

The fugitive disentitlement doctrine by its very nature must be of exceedingly limited application and strictly construed to prevent this kind of injustice.

In this case there was a clear and unequivocal violation of Petitioner's constitutional right to due process of law.

The District Judge could have or should have ordered the Court Receiver or the United States Marshal to verify with the Mexican authorities Petitioner's custody status and the fact that Petitioner was unable to return to the United States for doing exactly what the District Judge ordered prior to the court violating Petitioner's constitutional rights to due process. The court had the money, the Mexican Government had the charges against Petitioner and the only thing lacking was a simple verification.

A party's inability to comply with a judicial order constitutes a defense to a charge of civil contempt. See *United States v. Rylander*, 460 U.S. 752, 757 (1983).

The Federal Rules of Evidence, Rule 902 states in part:

> *Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:*
>
> 1. *Foreign public documents. A document purporting to be executed or attested in*

an official capacity by a person authorized by the laws of a foreign country

2. *to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person,*

3. *or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution*

4. *or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.*

The Hague Convention in abolishing the requirements of legalization for foreign documents states, in part,

Article 1

The present Convention shall apply to public documents which have been executed in the territory of one Contracting State and which have to be produced in the territory of another Contacting State.

For the purposes of the present convention, the following are deemed to be public documents:

a) documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of court . . .

Article 7

Each of the authorities designated in accordance with Article 6 shall keep a register or card index in which it shall record the certificates issued, specifying:

a) The number and date of the certificate

b) The name of the person signing the public document and the capacity in which he has acted, or in the case of unsigned documents, the name of the authority which has affixed the seal or stamp.

At the Request of any interested person, the authority which has issued the certificate shall verify whether the particulars in the certificate correspond with those in the register.

Each Government is required to have a Central Authority and Title 42 U.S.C. Section 11606.

"United States Central Authority"

(a) Designation

The President shall designate a Federal agency to serve as theCentral Authority for the United States under the Convention.

(b) Functions

The functions of the United States Central Authority are those ascribed to the Central Authority by the Convention and this chapter connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court . . . T.I.A.S. 10072; 33 U.S. Treaty Series (UST) 883; . . . .

Petitioner through his counsel turned in THREE different sets of Apostille Documents verifying Petitioner's detention in Mexico pursuant to The Hague convention.

On June 27, 2001 and on July 28, 2001 the District Judge had before him Apostille Documents verifying Petitioner's detention in Mexico and refused to accept these documents. Under the Hague Convention, the Court only had these choices. 1) Accept the documents as Judicial Notice; 2) Ask the Country of Mexico to verify that the documents are valid; 3) Ask the contracting government to interpret the meaning of the documents or 4) Declare the treaty to be unconstitutional. The District Judge by stating "The court is unmoved by Cohen's implausible and unsupported position that he is under house arrest in Mexico" disregarded the requirements of the treaty between the United States and Mexico and thereby disregarded the Supreme Law of the Land. U.S. Const. Article VI, cl. 2. [*5]

The Court is equally unfaithful to that command when it permits state courts to disregard the Nation's treaty

obligations. Alden v. Maine, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999).

Under the Treaty (Hague Convention) each country is required to appoint "special persons" who have the signature power of their respective counties with respect to Apostille Documents. Only these people are authorized to grant Apostille documents. In the United States, only the "Secretary of State of the United States" and for each State their respective "Secretary of State" has this power and in Mexico only the "Subsecretario de Gobierno" has this power. Each government can only accept signatures from "duly appointed officials" when it relates to OFFICIAL documents and or PUBLIC DOCUMENTS.

The rationale and motive for the United States Government and for that matter every government that entered into the Hague Convention for authentication was so that *only* governments could verify, interpret and approve the validity of the documents passing between member countries. This way, each judicial officer knows that the documents presented are real and if necessary he can get an interpretation from the issuing judicial officer of the foreign state. But the District Judge unreasonably refused to engage in this process.

If not for the District Court's conduct, Petitioner's issues on his prior appeal would have more than likely resulted in reversal. On November 27, 2000, the District Court issued its summary adjudication ruling that "sex.com" is prohibited from being trademarked because it is GENERIC and has not obtained secondary meaning and therefore Petitioner had no rights. A trial would have resolved this issue.

The "Summary Adjudication" was based upon disputed facts that should have been tried before a jury. Petitioner has always defended the fact that he was the owner of the trademark rights to the name "sex.com" since 1979.

Had Petitioner's argument that Respondent Kremen lacked standing been determined by the panel, it is likely to have prevailed. It is inescapable that a consequence of such a ruling is the mooting of the conversion issue addressed in the Kremen NSI appeal because lack of standing would bar Kremen there as well.

The panel's decision to exercise its "discretion to dismiss the appeal pursuant to the fugitive disentitlement doctrine" based on *Paretti v. United States,* 143 F.3d 508, 510-11 (9th Cir. 1998) (en banc) is misguided. The facts here are not like those in *Paretti.* Petitioner was never a fugitive, was not a foreign national, did not have a pending criminal case and was only held in Mexico because he complied with the Court's order.

In sum, no rational basis exists for the panel's exercise of its discretion, and without any recitation of facts in support, its decision must be viewed as arbitrary, particularly in light of the facts expressed herein. Petitioner's Fifth Amendment right not to be deprived of property without due process of law has been violated. Moreover, guidance regarding how to treat the actions of an opposing party who acts to perpetuate the "fugitive" status about which he complains is necessary. Additionally, the specter of loss of international respect engendered by the district court's act of disregarding a foreign country's Apostille documents and mandating a violation of that country's laws to comply with its order must be carefully considered.

The District Judge's ruling that "sex.com" was not able to be trademarked was erroneous and most importantly the District Court now recognizes that fact in the Judge's current order.

CONCLUSION

The Fugitive Disentitlement Doctrine must be limited so that it doesn't apply to Petitioner and others who are held in custody in a foreign country for attempting to comply with a directive issued by the very court which imposed this ultimate sanction. Due Process under the Fifth Amendment requires no less.

Dated: July 22, 2005

Respectfully submitted,

STEPHEN MICHAEL COHEN
Petitioner in Pro Se

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARY KREMEN; et al., Plaintiffs-Appellees, v. OCEAN FUND INTERNATIONAL LTD., a foreign company; et al., Defendants, and STEPHEN MICHAEL COHEN, Defendant-Appellant.	No. 04-17214 D.C. No. CV-98-20718-JW Northern District of California, San Jose ORDER (Filed Mar. 24, 2005)

Before: KOZINSKI and McKEOWN, Circuit Judges, and FITZGERALD, District Judge.

Appellee's motion to have this case assigned to the panel that decided appellant's prior appeal, No. 01-15886, is granted.

Appellee's request to strike appellant's "Reply and Clarification in Response to Appellee [sic] Motion to Dismiss," filed on February 28, 2005, is granted. *See* Fed. R. App. P. 27. The February 28, 2005 filing is stricken.

Appellee's motion to dismiss this appeal under the fugitive disentitlement doctrine is granted. Appellant was a fugitive the last time he appealed, *see Kremen v.*

Cohen, No. 01-15886, 2002 WL 2017073 (9th Cir. Aug. 30, 2002) (unpublished memorandum disposition), is a fugitive now, and has demonstrated no likelihood that he will submit to the jurisdiction of the district court at any foreseeable point in the future. We therefore dismiss this appeal. *See Parretti v. United States*, 143 F.3d 508, 510-11 (9th Cir. 1998) (en banc).

Appellee's requests for sanctions and to identify appellant as a "vexatious litigant" are denied.

DISMISSED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARY KREMEN; et al., Plaintiffs-Appellees, v. OCEAN FUND INTERNATIONAL LTD., a foreign company; et al., Defendants, and STEPHEN MICHAEL COHEN, Defendant-Appellant.	No. 04-17214 D.C. No. CV-98-20718-JW Northern District of California, San Jose ORDER (Filed Apr. 29, 2005)

Before: KOZINSKI and McKEOWN, Circuit Judges, and FITZGERALD, District Judge.

Appellant's "Petition for Rehearing or Rehearing En Banc" is denied. Judges Kozinski and McKeown reject the suggestion for rehearing en banc on behalf of the court. *See* 9th Cir. Gen. Ord. 6.11.

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GARY KREMEN,

Plaintiff,

v.

STEPHEN MICHAEL COHEN,

Defendant. /

NO. C98-20718 JW
JUDGMENT

The Court hereby enters judgment in favor of Plaintiff Gary Kremen against Defendants, Stephen Michael Cohen, Ocean Fund Internacional Ltd., Ynata Ltd. and SandMan International, Ltd., jointly in the amount of $40,000,000, plus punitive damages in the sum of $25,000,000.00.

A constructive trust is imposed upon all monies and properties of the Defendants. The Receiver is ordered to collect and hold such properties pending further order of this Court.

The warrant of arrest issued on March 2, 2001 shall remain outstanding until defendant Stephen M. Cohen surrenders the property of each defendant to this Court.

Dated: April 3, 2001

/s/ James Ware
JAMES WARE
United States District Judge